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May 4, 1998

EX PARTE OR LATE FILED

Writer's Direct Dial Number  
(202) 887-8787

Ms. Magalie Roman Salas  
Secretary  
Federal Communications Commission  
1919 M Street, N.W. - Room 222  
Washington, D.C. 20554

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MAY - 4 1998

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re: **EX PARTE**

The Cheyenne River Sioux Tribe Telephone Authority's and U S West  
Inc.'s Joint Petition for Expedited Ruling Preempting South Dakota Law,

CC Docket No. 98-6

Petition of the Cheyenne River Sioux Tribe Telephone Authority for Designation  
as an Eligible Telecommunications Carrier Pursuant to Section 214(e)(6) of the  
Communications Act, FCC 97-419, AAD/USB File No. 98-21

Dear Ms. Salas:

Pursuant to Section 1.1206 of the Federal Communications Commission's  
("Commission") rules, 47 C.F.R. § 1.1206, I hereby notify you that J.D. Williams, Alice Walker,  
James Casey, representing the Cheyenne River Sioux Tribe Telephone Authority ("CRSTTA"),  
and Darrell Gerlaugh of Gila River Telecommunications Inc., met on Thursday, April 30, 1998  
with William Kehoe and Alex Starr of the Common Carrier Bureau.

CRSTTA provided a general overview of its preemption petition and the factual  
background for the filing. CRSTTA explained the basic federal law on tribal jurisdiction and  
regulation on and off of the reservation and discussed Federal Indian law holdings in *Mescalero  
Apache v. Jones*, *Oklahoma Tax Commission*, and *Montana v. U.S.*, as well as the law and  
meaning of tribal sovereignty and an Indian tribe's sovereign immunity from suit. CRSTTA  
explained the separate and distinct nature of these issues and their irrelevance with regard to the  
merits of the preemption petition and stressed the importance of keeping the issues in that petition  
separate from the jurisdictional issues raised in CRSTTA's pending petition seeking designation  
as an eligible telecommunications carrier and state court litigation arising out of the same  
transaction.

In addition to the above legal issues, CRSTTA discussed a number of factual/procedural  
matters surrounding the underlying matter upon which the preemption petition is based.  
Specifically, CRSTTA explained its excellent quality of service record and noted that the South  
Dakota Public Utilities Commission's ("SDPUC") denial of the U S West sale was not premised  
on service problems. Moreover, CRSTTA detailed its significant efforts to meet the concerns of  
the SDPUC by establishing a taxation agreement and dispute resolution mechanism, and noted  
the SDPUC's unwillingness to negotiate such settlements. CRSTTA also described a number of

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## MORRISON & FOERSTER LLP

Magalie Roman Salas

February 13, 1997

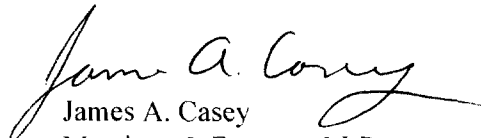
Page Two

its other possible options including the formation of a South Dakota state corporation and overbuilding additional infrastructure. CRSTTA explained that these options are, however, wasteful, inefficient, and offensive to tribal sovereignty and ultimately would not serve the public interest.

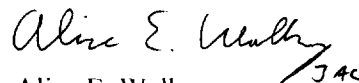
Finally, CRSTTA discussed the FCC's trust responsibility to respect and uphold tribal sovereignty, self-determination and tribal rights. Pursuant to this trust responsibility, CRSTTA requested expedited consideration and resolution of this matter. Attached hereto is a copy of a list of talking points presented at the meeting.

Pursuant to Section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, an original and two copies of this letter and attachment are being submitted to the Office of the Secretary for inclusion in the public record. Please direct any questions or concerns to the undersigned.

Sincerely,



James A. Casey  
Morrison & Foerster, LLP  
Counsel for Cheyenne River  
Sioux Tribe Telephone Authority



Alice E. Walker  
Greene, Myer & McElroy  
Counsel for Cheyenne River  
Sioux Tribe Telephone Authority

cc: William Kehoe  
Alex Starr

Attachment

**SUMMARY OF THE JOINT PETITION OF THE  
CHEYENNE RIVER SIOUX TRIBE TELEPHONE  
AUTHORITY AND U S WEST COMMUNICATIONS,  
INC. FOR PREEMPTION OF STATE LAW  
PURSUANT TO 47 U.S.C. § 253**

- The Cheyenne River Sioux Tribe Telephone Authority (“Telephone Authority”) is a state-of-the-art telecommunications company, operating under authority of the Cheyenne River Sioux Tribe. The Telephone Authority is a small local exchange company that currently owns and operates five telephone exchanges, serving approximately 2,700 access lines, almost entirely within the Cheyenne River Indian Reservation. The Telephone Authority provides state-of-the-art basic and advanced telecommunications services, including all services required by State law, fiber optic long distance service, computerized billing service, mobile telephone system, equal access conversion, free fire bar service, and Internet access services at affordable rates to its customers, with few or no complaints regarding that service.
- The Telephone Authority wishes to purchase three rural South Dakota telephone exchanges now operated by US West Communications (“US West”), a large incumbent local exchange carrier. The exchanges at issue are: Timber Lake, located in part on the Cheyenne River Indian Reservation, and in part on the Standing Rock Indian Reservation; and Morristown and McIntosh, located entirely within the Standing Rock Indian Reservation.
- The Telephone Authority and US West have filed a joint petition with the Commission seeking preemption of a South Dakota Public Utility Commission (“SDPUC”) decision to deny, under South Dakota Codified Laws § 49-31-59, the sale of the U S West local exchange properties to the Telephone Authority.
- The SDPUC decision effectively erects a barrier to entry under § 253 of the Communications Act of 1934, as amended, (codified as 47 USC § 253) for all Indian tribes and tribal entities seeking to operate telephone exchanges within South Dakota.
- The Telephone Authority possesses sovereign immunity as an entity of the Cheyenne River Sioux Tribe. The SDPUC has concluded that because it cannot enforce, based upon the effect of the Telephone Authority’s sovereign immunity, state taxation laws or regulatory laws and policies against the Telephone Authority’s activities, the sales of the three telephone exchanges are not in the public interest.
- The determination whether the SDPUC’s application of state law constitutes a barrier to entry does not require the Commission to delve into peripheral issues of sovereign immunity or tribal versus state jurisdiction within Indian reservation boundaries. The Commission need never consider the question of who will ultimately regulate the Telephone Authority’s activities. Rather, the simple issue before the Commission is

whether the SDPUC's application of state law constitutes a barrier to entry to all Indian tribes and tribal entities seeking to provide telecommunications services in South Dakota, since all Indian tribes and tribal entities enjoy sovereign immunity. If the Commission resolves this issue in the affirmative, it must preempt the SDPUC decision.

- The Telephone Authority and US West assert that the SDPUC's application of state law to prohibit the sale of the three exchanges to the Telephone Authority establishes a barrier to entry and the Commission should preempt such application under 47 U.S.C. § 253(d). Commission precedent establishes that the application of state laws to prevent an entire defined class of potential competitors from providing a given service constitutes an impermissible barrier to entry. Thus, the SDPUC's decision violates § 253 of the Act by singling out one class of potential competitors, Indian Tribes and tribal entities in South Dakota, and preventing them from becoming service providers in the local exchange market.
- The SDPUC's claim that the Telephone Authority is free to resell or build duplicate facilities does not save its decision under § 253. Commission precedent also establishes that competitors must be able to choose the best method of providing service in a given area based upon their own business decisions. The SDPUC cannot limit the Telephone Authority's options.
- In addition, the SDPUC's claim that the sale is not in the public interest because it cannot ensure service quality and consumer protection also is not in accordance with Commission precedent. The Commission has held that an unsupported claim that regulatory jurisdiction is necessary to ensure service quality, affordable rates, etc., is not a sufficient basis for erecting a barrier to entry. Even if a barrier to entry is justified under a state's legitimate public interest authority, under the statute, any barrier erected must be competitively neutral. The SDPUC's blanket prohibition on the purchase of telephone exchanges by Indian Tribes and tribal entities is not competitively neutral.
- The Telephone Authority has a well-deserved reputation for high quality, affordable telecommunications service. The actions of the SDPUC have prohibited the Telephone Authority's ability to expand its business operations and bring this excellent service to a whole new group of subscribers. The SDPUC's decision hinders rather than serves the public interest.
- The SDPUC opposition to the sale of the three exchanges has resulted in a more than two-year delay in the Telephone Authority's expansion of services. The Telephone Authority's purchase of the three exchanges represents a critical economic development project for the Cheyenne River Sioux Tribe, which will decrease unemployment and stimulate the local economy. The other 64 local exchanges sold to new operators by US West are in operation and generating revenue. The SDPUC must not continue to stymie the Telephone Authority's efforts for the sole and impermissible reason of the Telephone Authority's status as a tribal business entity.

- The Commission has a trust responsibility to the Telephone Authority to act in accordance with and to support tribal sovereignty and economic self-determination. Continued delay in resolving these issues aggravates the harm to the Telephone Authority and the Cheyenne River Sioux Tribe. The Telephone Authority and US West request that the Commission expedite its consideration of this matter.